

NO. PD-0429-16

FILED
COURT OF CRIMINAL APPEALS
11/14/2016
ABEL ACOSTA, CLERK

IN THE COURT OF CRIMINAL APPEALS OF TEXAS

RUSSELL LAMAR ESTES,

Appellant,

v.

THE STATE OF TEXAS,

Appellee

On Petition for Discretionary Review from the 2nd Court of Appeals
Case No. 02-14-00460-CR

**APPELLANT'S BRIEF ON THE MERITS
OF STATE'S PETITION FOR DISCRETIONARY REVIEW**

– ORAL ARGUMENT NOT PERMITTED –

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NO. PD-0429-16

RUSSELL LAMAR ESTES	§	IN THE COURT OF
	§	
VS.	§	CRIMINAL APPEALS
	§	
STATE OF TEXAS	§	IN AUSTIN, TEXAS

BRIEF OF RUSSELL LAMAR ESTES ON THE MERITS

To the Honorable Judges of the Court of Criminal Appeals:

Comes now, Russell Estes, Appellant and Respondent, and respectfully files this Brief on the Merits in the above referenced and entitled cause and would respectfully show this Honorable Court of Criminal Appeals as follows:

STATEMENT OF PROCEDURAL HISTORY

Appellant was charged by indictment with twenty-three felony counts under Cause Number 1388628R. (CR, 7-10).¹ Prior to trial, the State waived Counts Eight through Twenty-three of the indictment. (RR2, 5). Appellant filed a Motion to Quash Counts 1-5 of the Indictment, alleging that Section 22.011(f) of the Texas Penal Code is unconstitutional both facially and as applied to him. (CR, 78-121). The trial court denied Appellant's Motion. (RR3, 4). Appellant pleaded "not guilty" to all seven counts of the indictment. (RR2, 6-7). Appellant stood trial in the 396th District

¹ The Clerk's Record is referenced throughout this Brief as "CR," followed by the page number of the Clerk's Record. The Reporter's Record, which is comprised of seven volumes, is referenced with an "RR" followed by the volume number and the page number or Exhibit number within the Volume referenced (i.e., Volume 2, page 2 is referenced as "RR2, 2").

Court of Tarrant County on five counts of sexual assault bigamy and two counts of indecency with a child. (RR2 - RR6). On November 5, 2014, the jury found Appellant guilty on Counts One through Seven and also made an affirmative finding on the special issue². (RR6, 195; CR, 236-44). After a trial on punishment, (RR6, 6-103), the jury assessed Appellant's sentence at twelve years in the Texas Department of Criminal Justice on each count of sexual assault bigamy and ten years on each count of indecency with a child, with community supervision recommended on the latter. (CR, 254-260; RR6, 104).

On appeal, the Second Court of Appeals sustained Appellant's as-applied constitutional challenge to Section 22.011(f), overruled his other nine issues, affirmed the trial court's judgments of conviction on Appellant's charges for indecency with a child in all respects, modified the trial court's judgments on Appellant's charges for sexual assault to reflect convictions for second-degree felonies, reversed the trial court's judgments on Appellant's charges for sexual assault as to punishment, and remanded the sexual assault cases to the trial court for a new trial on punishment only. The State filed a Petition for Discretionary Review on April 21, 2016, and Appellant filed a Petition for Discretionary Review on April

² The Special Issue was presented to the jury as: "Do you find beyond a reasonable doubt that [K.A.] was a person whom the Defendant, Russell Lamar Estes, was prohibited from marrying or purporting to marry or with whom Russell Lamar Estes was prohibited from living under the appearance of being married as defined by the offense of bigamy . . . ?" (CR, 243).

28, 2016. On September 14, 2016, this Court granted the State's Petition for Discretionary Review and granted Appellant's Petition for Discretionary Review on Grounds One and Two.³ Both the State and Appellant have since submitted briefs on the merits of their respective grounds for review.

³ Appellant presented three questions or grounds for review in his Petition. See Appellant's Pet. for Discretionary Review.

SUMMARY OF THE ARGUMENTS

Section 22.011(f) of the Texas Penal Code is unconstitutional as applied to Appellant in this case. The statute allowed Appellant to be charged with, convicted of and punished for felonies of the first degree (rather than the second degree) based solely on his marital status, and this was not rationally related to a legitimate state interest. The Second Court of Appeals correctly found that, under the circumstances of this case and as applied to Appellant, Section 22.011(f) violates equal protection because it penalizes him differently than a similarly situated defendant without a rational basis for doing so. The court's opinion should be affirmed in this respect.

In addition to making the same arguments it made to the Court of Appeals, the State now argues for the first time that the application of section 22.011(f) to Appellant in this case is not irrational because the complainant was legally too young to marry, and therefore, notwithstanding Appellant's marital status, section 22.011(f) validly applies because Appellant was "prohibited from marrying" her under any circumstances. This argument does not provide grounds for sustaining Appellant's prosecution, conviction and punishment under Section 22.011(f) because the necessary facts were not alleged or proved at trial, the only prohibitions on marriage applicable to this case are those enumerated in the bigamy statute, and the jury was not instructed on any other prohibitions on marriage or asked to make

a finding on whether Appellant was “prohibited from marrying” the complainant due to her age. Further, the State’s argument is not responsive to the question presented by the State on which this Court granted review. This Court should affirm the judgment of the Court of Appeals in part, reverse the judgment of the Court of Appeals in part, and order the prosecution of Appellant on the sexual assault bigamy charges dismissed (or remand this case to the trial court to enter such an order).

ARGUMENT

The statute that is the subject of Appellant's as-applied constitutional challenge reads as follows:

An offense under this section is a felony of the second degree, except that an offense under this section is a felony of the first degree if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01.

Tex. Penal Code Ann. § 22.011(f) (West 2011). Counts One through Five of the Indictment in this case alleged that K.A.⁴, the complainant, was “a child . . . with whom the defendant was prohibited from marrying or purporting to marry or with whom the defendant was prohibited from living under the appearance of being married because the defendant was legally married.” (CR, 7-8). The State's only factual basis for this allegation was that Appellant was legally married at the time of the alleged sexual assault. Id.; (RR5, 172). The Court of Appeals concluded that, under the circumstances of this case and as applied to Appellant, Section 22.011(f) “violates equal protection because it penalizes him differently than a similarly situated defendant without a rational basis for doing so.” *Estes v. State*, 487 S.W.3d 737, 750 (Tex. App.—Fort Worth 2016, pet. granted).

The State has effectively conceded that Appellant was treated differently than

⁴ See Tex. R. App. Proc. 9.10.

a similarly situated defendant but contends that the application of section 22.011(f) to Appellant is not irrational because it advances multiple legitimate government interests. State’s Br. on the Merits of State’s Pet. for Discretionary Review, pp. 13-14. Specifically, the State argues that it has legitimate interests in protecting the institution of marriage and the well-being of children. Id. at 14-17. The State also argues that the application of section 22.011(f) to Appellant in this case is not irrational because K.A. was legally too young to marry, and therefore, “notwithstanding the appellant’s marital status, section 22.011(f) validly applies because the appellant was ‘prohibited from marrying’ K.A. under any circumstances.” Id. at 18-19.

I. The application of section 22.011(f) to Appellant in this case has no rational basis.⁵

The provision making sexual assault a first-degree felony in certain circumstances was added to Section 22.011(f) in 2005. (CR, 109-10); Act of May 29, 2005, 79th Leg., R.S., ch. 268, § 4.02. The legislation that amended Section 22.011(f) was enacted to “better regulate activities associated with bigamy and

⁵ As articulated in his Brief filed with this Court on October 21, 2016, Appellant believes his equal protection claim should be reviewed using strict scrutiny. Appellant’s Br. on the Merits, pp. 15-20. This Brief, however, addresses the specific question on which this Court granted the State’s Petition for Discretionary Review: “Did the Court of Appeals properly conclude that there was no rational basis for the appellant receiving disparate treatment?” State’s Pet. for Discretionary Review, p. 3. Accordingly, in this Brief, Appellant will argue why the application of Section 22.011(f) to him in this case fails the rational-basis test, which requires that the disparate treatment at issue be rationally related to a legitimate state interest. *Sullivan v. University Interscholastic League*, 616 S.W.2d 170, 172 (Tex. 1981).

polygamy.” (CR, 99). The intent of the specific provision in the bill, SB 6, amending Section 22.011(f) was to enhance the punishment by one class for the offense of sexual assault and the offense of prohibited sexual conduct “when the offense of bigamy or certain categories of bigamy are involved.” (CR, 106). As the Court of Appeals observed in its Opinion, “nothing in the record shows that the increased penalty based only on [A]ppellant's status of being married serves that rational purpose of the statute; the evidence does not show that appellant sexually assaulted [K.A.] as part of an allegedly bigamous or polygamous relationship or under any ostensibly religious justification.” *Estes*, 487 S.W.3d at 748. Appellant was not, is not and has never been engaged in any bigamous or polygamous conduct, and the State has not alleged otherwise. Therefore, the application of Section 22.011(f) to Appellant in this case is not rationally related to the express governmental interest the legislation that amended Section 22.011(f) was enacted to promote.

In its Brief, the State offers two “legitimate” interests it says are advanced by the application of section 22.011(f) to Appellant in this case: protecting the institution of marriage and protecting the well-being of children. State’s Br. at 14, 16. The Court of Appeals correctly found that neither of these interests provide a “rational basis” for the disparate treatment Appellant received in this case.

The State relies on the Supreme Court’s opinion in *Obergefell v. Hodges*, ___ U.S. ___, 135 S.Ct. 2584, 192 L.Ed.2d 609 (2015), in support of its argument that it

has a legitimate interest in protecting the institution of marriage, but it reaches too far when it concludes that it “may legitimately consider the responsibilities of marriage in making policy decisions regarding appropriate criminal punishment ranges.” State’s Br. at 14-15. Conspicuously, the State does not provide one example of a penal statute (or other act of government) that constitutionally subjects married persons to a greater punishment than unmarried persons who commit the same offense. It is one thing “to vary the benefits and responsibilities that come with marriage,” See *id.* (citing *Obergefell*, 135 S.Ct. at 2601), but it is quite another (patently irrational) matter to class an individual’s actions as a higher degree of felony with a far greater possible punishment simply because of his marital status. The latter does not “protect and nourish the union of marriage” in any reasonable sense.

Appellant does not contest that the State has a legitimate interest in protecting the well-being of children and preventing their sexual exploitation, but here again, the State goes too far with its argument that the application of Section 22.011(f) in this case “advances that interest in creating greater consequences for those adults, like the appellant, who would use the ‘cloak of marriage’ to gain access to children whose parents might be less cautious in sending their children to homes with married parents.” *Id.* at 16-17. The record as referenced by the State in its Brief (See State’s Br. at 17 n. 9) does not support its contention that Appellant’s “status as a married

family man clearly played a role in obtaining [K.A.'s mother]'s trust so that he could gain better access to K.A. while ostensibly 'supervising' her." *Id.* at 17. As the Court of Appeals noted:

The evidence in this case . . . does not show that appellant used his marital status to gain the trust of [K.A.] or her parents. [K.A.]'s mother testified that she was aware that appellant was married and that she and her husband had a friendly and trusting relationship with appellant and his wife. But nothing in the record suggests that [K.A.]'s mother would have trusted appellant less or would not have allowed [K.A.] to visit and stay at his house if he and his wife had displayed all other attributes of their relationship—including their cohabitation and their cooperative raising of children—while remaining legally unmarried. Nor does the record contain evidence that supports the general proposition that a defendant's status of being married creates greater opportunities and access for sexually assaulting children.

Estes, 487 S.W.3d at 748-749. The Court of Appeals rightly rejected the State's "cloak of marriage" argument, and its rationale provides a cogent basis for this Court to do the same.

There is no rational basis for Appellant receiving disparate treatment in this case based on his marital status. The State has failed to show that the application of Section 22.011(f) to Appellant in this case is rationally related to a legitimate state interest. Therefore, the part of the Court of Appeals' decision declaring that the application of Section 22.011(f) to Appellant in this case violates equal protection should be affirmed. See *Tex. R. App. P. 78.1(a)*.

II. Appellant's prosecution, conviction and punishment under Section 22.011(f) cannot be sustained on the ground that the statute was constitutionally applied because appellant was "prohibited from

marrying” K.A. under any circumstances.

The State makes one other argument, one it did not make in the trial court or Court of Appeals, in support of its position that Section 22.011(f) was constitutionally applied to Appellant. Because fifteen year-old K.A. was legally too young to marry, the State claims, Appellant was “prohibited from marrying” her under any circumstances, notwithstanding his marital status, and therefore Section 22.011(f) validly applies in this case. State’s Br. at 18-19. For multiple reasons, this Court should either reject the State’s argument or not even consider it.

First, the State did not make this argument in the trial court (or even in the Court of Appeals). The Indictment alleged that Appellant was prohibited from marrying or purporting to marry K.A. or living with K.A. under the appearance of being married simply because he “was legally married.” (CR, 7-10). The trial court instructed the jury on the definition of bigamy under Section 25.01 and worded the Special Issue as follows: “Do you find beyond a reasonable doubt that [K.A.] was a person whom the Defendant, Russell Lamar Estes, was prohibited from marrying or purporting to marry or with whom Russell Lamar Estes was prohibited from living under the appearance of being married as defined by the offense of bigamy as defined above?” (CR, 243); see §§ 25.01(a)(1), (b). Addressing this issue in her closing argument, the State told the jury, “Basically, he's prohibited from marrying her because he's already legally married, and that's pretty much it.” (RR5, 172).

Further, the evidence presented at trial was not clear on how old K.A. was when the alleged instances of sexual assault occurred, and because the jury was only asked to make a finding based on the offense of bigamy, no one can say whether the jurors were convinced beyond a reasonable doubt that Appellant was prohibited from marrying K.A. based on her age.

Next, this argument is not responsive to the question on which this Court granted review. The Question for Review presented in the State's Petition asks, "Did the Court of Appeals properly conclude that there was no rational basis for the appellant receiving disparate treatment?" State's Pet., p. 3. The argument the State makes now does not answer this question; rather, it is an attempt by the State to convince this Court that Appellant did not receive disparate treatment at all because he was "prohibited from marrying" K.A. regardless of his marital status.

Finally, the State's argument is based on a misconstruction of the applicable statute. Section 22.011(f) makes sexual assault a first-degree felony "if the victim was a person whom the actor was prohibited from marrying or purporting to marry or with whom the actor was prohibited from living under the appearance of being married under Section 25.01." § 22.011(f). Under Section 25.01, an individual commits an offense if he is legally married and he:

(A) purports to marry or does marry a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor's prior marriage, constitute a marriage; or

(B) lives with a person other than his spouse in this state under the appearance of being married

[Tex. Penal Code Ann. § 25.01\(a\)\(1\) \(West 2011\)](#). The State’s argument assumes that the prepositional phrase “under Section 25.01” applies only to the circumstance “with whom the actor was prohibited from living under the appearance of being married” and not the other listed circumstances (“prohibited from marrying or purporting to marry”) in Section 22.011(f). See State’s Br. at 10. The State notes that, while “both sections 22.011(f) and 25.01 include the circumstances of ‘purports to marry’ and ‘living under the appearance of being married’, section 25.01 does not include the circumstance of ‘prohibited from marrying’,” and from this draws the conclusion that “sections 22.011(f) and 25.01 are not coterminous, and it is reasonable to interpret from their difference that section 22.011(f)’s distinct ‘prohibited from marrying’ circumstance can be established without proving bigamy.” *Id.* at 10-11 (citations omitted).

Appellant does not contend that bigamy is an element of sexual assault under 22.011(f) or that the State was required to prove Appellant committed an offense under Section 25.01 to prove he committed an offense of sexual assault bigamy as charged in this case.⁶ However, the plain language of the statutes do not support

⁶ Although, based on the available legislative history offered at trial in support of Appellant’s Motion to Quash, (CR, 83-119), it is doubtful that the legislature intended to make sexual assault a first-degree felony in cases where bigamous conduct is *not* alleged, *See State v. Rosseau*, 396 S.W.3d 550, 558 (Tex. Crim. App. 2013), the statute as written is susceptible to the interpretation that one can commit a first-degree sexual assault under 22.011(f) without being guilty of bigamy

construing them the way the State urges. The language “or with whom the actor was prohibited from living under the appearance of being married under Section 25.01” is not separated from the language “prohibited from marrying or purporting to marry” by a comma, suggesting that the prepositional phrase “under Section 25.01” applies to all three listed circumstances, including “prohibited from marrying”. Therefore, to prove Appellant (or anyone) guilty of first-degree sexual assault under Section 22.011(f), the State must prove beyond a reasonable doubt that the victim was a person whom the actor was prohibited from marrying under Section 25.01, purporting to marry under Section 25.01 or with whom the actor was prohibited from living under the appearance of being married under Section 25.01. See § 22.011(f). It would be insufficient to merely prove that he was prohibited by a different statute from marrying the complainant.⁷

It warrants mention here that, just because Section 25.01 does not use the

as defined by Section 25.01. However, under the Rule of Lenity, any “fair doubt” as to whether bigamy as defined by Section 25.01 must be alleged and proved to make sexual assault a first-degree felony per Section 22.011(f) should “be resolved in favor of the accused.” *Cuellar v. State*, 70 S.W.3d 815, 821 (Tex. Crim. App. 2002) (Cochran, J., concurring) (quoting *Murray v. State*, 21 Tex. App. 620, 633, 2 S.W. 757, 761 (1886)).

⁷ From the record, the State and Appellant seemed to agree at trial that the only legal prohibitions on marriage applicable to this case are those spelled out in Section 25.01. In the Court’s Charge on the Special Issue, the trial court instructed the jury based on the language from Subsections (a)(1) and (b) of the bigamy statute (and no other statute) and asked the jury whether it found beyond a reasonable doubt that K.A. was a person whom Appellant was prohibited from marrying or purporting to marry or with whom Appellant was prohibited from living under the appearance of being married as defined by the offense of bigamy **as defined by the preceding instructions**. (CR, 243); see § 25.01(a)(1), (b). The State did not object to this charge or request any additional language. (RR5, 163).

exact wording “prohibited from marrying” does not mean that the statute “does not include the circumstance of ‘prohibited from marrying’,” as the State argues. State’s Br. at 10. Section 25.01 is a penal statute and, like any other penal statute, prohibits specified conduct. Under Section 25.01, an individual is prohibited from marrying “a person other than his spouse in this state, or any other state or foreign country, under circumstances that would, but for the actor's prior marriage, constitute a marriage.” § 25.01(a)(1)(A). Therefore, Section 25.01 plainly does include all three circumstances listed in Section 22.011(f).

Because Section 25.01 does not prohibit marriage based on either spouse’s age, whether K.A. was too young to legally marry is irrelevant and cannot provide a basis for Appellant’s sexual assault bigamy convictions in this case. Further, this age-based theory was not advanced by the State at trial or in the Court of Appeals below, the jury was not instructed on any way in which Appellant was “prohibited from marrying” K.A. other than those expressly stated in Section 25.01(a)(1), and this argument is not responsive to the question presented by the State on which this Court granted review.


CONCLUSION AND PRAYER

The application of Section 22.011(f) of the Texas Penal Code to Appellant in this case is not rationally related to any legitimate state interest. The State's alternate argument that the statute was constitutionally applied herein because Appellant was "prohibited from marrying" the complainant under any circumstances is based on a misconstruction of the applicable statute, facts that were not alleged or proved at trial, and a legal theory that was not submitted to the jury. Simply put, Section 22.011(f), as applied to Appellant in this case, provides dissimilar treatment for married and unmarried persons who are similarly situated without a rational basis for doing so. The Court of Appeals was right to conclude that, under the circumstances of this case and as applied to Appellant, Section 22.011(f) violates equal protection. Appellant prays that this Court will: (1) affirm the judgment of the Court of Appeals in part; (2) reverse the part of the judgment of the Court of Appeals modifying the trial court's judgments on the charges for sexual assault to reflect convictions for second-degree felonies, reversing the trial court's judgments on the charges for sexual assault as to punishment only and remanding the sexual assault cases to the trial court for a new trial on punishment only; and (3) either order the prosecution of Appellant on the sexual assault bigamy charges dismissed or remand this case to the trial court to enter an order dismissing the prosecution.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing Brief was electronically served upon Steven W. Conder, Assistant Criminal District Attorney, Tim Curry Criminal Justice Center, 401 W. Belknap Fort Worth, Texas 76196, and Lisa McMinn, State Prosecuting Attorney, via e-mail to ccaappellatealerts@tarrantcounty.tx.gov and information@spa.texas.gov, respectively, on November 11, 2016.

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CERTIFICATE OF COMPLIANCE

I certify that this document complies with Tex. R. App. P. 9.4, specifically using a conventional typeface no smaller than 14-point for text and 12-point for footnotes, and contains 3,324 words, excluding those parts specifically excepted by Tex. R. App. P. 9.4(i)(1), as computed using Microsoft Word.

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